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No. 95-1086

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

EMILY DISTAJO, et al.,

Petitioners,

vs.

DOCTOR'S ASSOCIATES, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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28 pp

QUESTIONS PRESENTED

1. Whether the United States District Court for the District of Connecticut had subject matter jurisdiction, under 28 U.S.C. § 1332, over respondent Doctor's Associates, Inc.'s ("DAI") petitions to compel arbitration pursuant to Section 4 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 4, where there was complete diversity among the parties to each Section 4 action.

2. Whether, in holding that the full faith and credit statute, 28 U.S.C. § 1738, did not bar the District Court from granting DAI's petitions to compel arbitration, the United States Court of Appeals for the Second Circuit correctly concluded that under Illinois law, Illinois courts would not have given preclusive effect to certain rulings by an Illinois trial court that were still subject to appeal.

3. Whether, in holding that the full faith and credit statute, 28 U.S.C. § 1738, did not bar the District Court from granting DAI's petitions to compel arbitration, the Second Circuit correctly concluded that rulings by a North Carolina trial court did not address the validity of DAI's arbitration agreement with the North Carolina petitioner.

4. Whether the District Court correctly decided not to abstain from exercising jurisdiction over DAI's petitions to compel arbitration under the particular facts of this case.

STATEMENT PURSUANT TO RULE 29.6

Doctor's Associates, Inc. states that it has no parent company, and that it has no subsidiaries (other than wholly-owned subsidiaries).

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATUTORY PROVISION INVOLVED

Section 4 of the Federal Arbitration Act, 9 U.S.C. § 4, provides:

> **Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination**
>
> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in

a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

July 30, 1947, c. 392, 61 Stat. 671; Sept. 3, 1954, c. 1263, § 19, 68 Stat. 1233.

STATEMENT OF THE CASE

DAI is the franchisor of "Subway" sandwich shops, and the petitioners are present or former Subway franchisees. Each petitioner entered into a franchise agreement with DAI that contained a virtually identical arbitration provision.[1/] This arbitration agreement provides that any claim arising out of or relating to the franchise agreement must be arbitrated in accordance with the commercial rules of the American Arbitration Association ("AAA").[2/]

When disputes later arose between petitioners and DAI, each petitioner ignored the agreement to arbitrate and sued DAI, its owners, affiliates and local agents in a state court. In each case, DAI promptly filed with the AAA a demand for arbitration in accordance with the arbitration agreement. And in response to each state court lawsuit, DAI filed a petition in the United States District Court for the District of Connecticut (the "District Court") to compel arbitration under Section 4 of

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[1] There are some differences in certain of the arbitration clauses about the site of the arbitration and how the costs of the arbitration are divided between the parties. Those differences are not relevant to the issues raised in the petition.

[2] Each of the arbitration clauses was substantially identical to the following provision:

> Any controversy or claim arising out of or relating to this contract or the breach thereof shall be settled by Arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association at a hearing to be held in Bridgeport, Connecticut and judgement upon an award rendered by the Arbitrator(s) may be entered in any court having jurisdiction thereof. The commencement of arbitration proceedings by an aggrieved party to settle disputes arising out of or relating to this contract is a condition precedent to the commencement of legal action by either party. Each party will be responsible for their own costs in conjunction with the arbitration proceeding. If Franchisee commences action in any court prior to an arbitrator's final decision on the controversy or claim, Franchisee will be responsible for all expenses incurred by both the Company and Franchisee in the Arbitration and the Court proceedings.

the FAA. This petition arises from petitioners' steadfast refusal to comply with their contractual obligations to arbitrate their disputes with DAI, and DAI's efforts to enforce those arbitration agreements under the FAA.

1. The events giving rise to this petition began in December 1993 when a group of Subway franchisees filed five lawsuits in the Circuit Court of Madison County, Illinois, against DAI, its owners, agents and affiliates. Counsel for these franchisees -- counsel for petitioners here -- later filed three more lawsuits on behalf of Subway franchisees against DAI and others in the Madison County Circuit Court during the spring and summer of 1994.[3/] During 1993 and 1994 petitioners' counsel also filed lawsuits against DAI on behalf of other Subway franchisees in state courts in North Carolina, Massachusetts and Pennsylvania. At about the same time, a group of five present and former Subway franchisees from Alabama brought actions against DAI in two different Alabama state courts.[4/]

In response to each state court action, DAI promptly filed a demand with the AAA for arbitration. When each franchisee refused to comply with DAI's arbitration demand, DAI filed separate petitions in the District Court to compel arbitration under Section 4 of the FAA. The District Court eventually consolidated those petitions (a total of sixteen) under the caption *Doctor's Associates, Inc. v. Distajo, et al.*[5/]

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[3] To say that these petitioners were "forum-shopping" in filing suit in Madison County would be an understatement: each petitioner in these eight Illinois actions works and lives in metropolitan Chicago, which is about 300 miles away from Madison County; the only Illinois parties in those cases are from the Chicago area; and none of the facts of any of the cases has the slightest connection to Madison County.

[4] The Alabama franchisees have not joined this petition.

[5] Each of DAI's petitions to compel arbitration arises out of a typical dispute between a franchisee and a franchisor, with each franchisee claiming that DAI and its agents breached the franchise agreement and committed various torts and statutory violations.

From the outset, petitioners' strategy was to delay resolution of DAI's Section 4 petitions for as long as possible, in order to seek rulings on arbitrability favorable to petitioners from the state courts before the District Court could compel arbitration.[6] For example, petitioners filed over 20 briefs in the District Court setting forth a series of tenuous arguments challenging the court's authority to hear the case. Among other things, petitioners claimed that the District Court lacked subject matter and personal jurisdiction, that venue was improper, and that the District Court should abstain from hearing the petitions under *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976). As a result of petitioners' dilatory tactics, the parties were forced to brief the same issues more than ten times. Petitioners' counsel frankly admitted during a hearing in the Madison County court that the Illinois petitioners were in a "race to the courthouse" and wanted to obtain a ruling from the state court that the Illinois actions were not arbitrable before the District Court could compel arbitration. R. App. 95, ¶ 6.[7]

In one respect, petitioners' efforts to thwart DAI's right to an expedited and summary resolution of its petitions to compel arbitration worked. For on October 24, 1994, over seven months after DAI filed its first Section 4 petition in the District Court, and about two weeks before the District Court ultimately granted those petitions, the Madison County Circuit

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[6] This Court has recognized that the intent of the FAA was to provide for "rapid and unobstructed enforcement of arbitration agreements", *Moses H. Cone Memorial Hosp. v. Mercury Construction Corp.*, 460 U.S. 1, 23 (1983). Section 4 requires an "expeditious and summary hearing, with only restricted inquiry into factual issues," *id.* at 22, and contemplates a decision on arbitrability in "very short order". *Id.* at 22, 23, nn. 26 & 27.

Owing to petitioners' tactics and the District Court's congested docket, however, it became impossible for the court to comply with these statutory mandates. DAI filed its first petition in March 1994, but the court did not issue its decision compelling arbitration until almost eight months later.

[7] "R. App." refers to respondent's Appendix.

Court ruled in the eight Illinois cases that the arbitration clause in the Subway franchise agreement was unenforceable. *See Doctor's Associates, Inc. v. Emily Distajo, et al.*, 66 F.3d 438, 449 (2d Cir. 1995). DAI timely filed a motion for reconsideration, and that motion is still pending before the state court. *Id.*

The North Carolina state court also entered two orders before the District Court could rule on DAI's Section 4 petitions. R. App. 54-60. In the North Carolina action, DAI had filed a motion with the trial court under Section 3 of the FAA to stay the lawsuit brought by petitioner Johnson in favor of arbitration, and a separate motion to dismiss Mr. Johnson's case. In the motion to dismiss, DAI contended that Mr. Johnson waived his right to challenge the arbitration agreement because he had previously participated in an arbitration with DAI. Although the North Carolina trial court summarily denied each motion, it never determined whether the arbitration clause in the Subway franchise agreement was enforceable. R. App. 54-60. Instead, the court merely held that Mr. Johnson had not waived his right to contest the validity of the arbitration clause. R. App. 56, *Distajo*, 66 F.3d at 450-51.[8/]

2. On September 29, 1994 the District Court denied each petitioner's motion to dismiss DAI's Section 4 petition. The Court held that it had subject matter and personal jurisdiction, and that venue was proper. The Court also rejected petitioners' argument that it should abstain from deciding DAI's petitions. Following this Court's decision in *Moses H. Cone*, the District Court recognized that "only exceptional circumstances will compel a federal court to relinquish jurisdiction due to parallel proceedings in state court." R. App. 45, citing *Moses H. Cone*, 460 at 13-14 (1983). The court concluded that petitioners "have not enumerated exceptional circumstances

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[8] In 1994 a trial court in Alabama held that John McCrary, who was also a defendant in *Distajo*, was not required to arbitrate his dispute with DAI. The Second Circuit held that the District Court should have accorded full faith and credit to this judgment of the Alabama trial court, *Distajo*, 66 F.3d at 447-50. That ruling is not an issue in this petition.

that warrant dismissal in deference to the state court litigation":

> Defendants contend, in a conclusory manner, that this court should decline to exercise jurisdiction over the matter under the doctrine of abstention, citing *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 813-17 (1976) . . . [and] claim that proceedings in over nine cases in state courts constitute compelling circumstances. There is nothing remarkable about parallel state litigation. Although it is not entirely clear how extraordinary the circumstances must be in order for the court to decline to exercise its jurisdiction in this context, it is clear that parallel proceedings alone is not sufficient.

R. App. 45. (citations omitted)

After receiving additional briefs, the District Court on November 10, 1994, granted DAI's 16 petitions to compel arbitration. *See Doctor's Associates, Inc. v. Emily Distajo, et al.*, 870 F. Supp. 34 (D.Conn. 1994). The court rejected petitioners' claim that DAI waived its right to arbitrate and held that the arbitration clause was mutually binding and not unconscionable. The court also held that the prior state court rulings did not preclude the federal court from granting DAI's petitions. *Id.* at 36.[9] On December 9, 1994, the District Court issued a separate decision in which the court expressly rejected the claim of the Illinois petitioners' that because the Madison County Circuit court had decided that the arbitration clause was unenforceable, the full faith and credit statute, 28 U.S.C. § 1738, prevented the District Court from granting DAI's petitions. The District Court concluded that Illinois courts would not give preclusive effect to the state court's ruling because DAI still had the right to appeal that ruling if its request

[9] The District Court apparently did not know about the October 24, 1994 ruling in Illinois until after it granted DAI's petitions to compel arbitration. For that reason, the District Court specifically addressed the preclusive effect of the Illinois ruling in its December 9, 1994 decision.

for reconsideration was denied. R. App. 51-52. The ruling therefore, was not "final" for *res judicata*/collateral estoppel purposes under Illinois law. *Id.* Each petitioner then took an appeal to the Second Circuit.

3. On December 16, 1994, less than a month after the District Court had compelled arbitration in the 16 *Distajo* actions, petitioners' counsel filed yet another lawsuit on behalf of two more Chicago-area franchisees -- Sandra and Raymond Bickel -- in Madison County state court. Once again, DAI promptly filed in the District Court a petition to compel arbitration pursuant to Section 4 of the FAA. On the day that he received notice of the Order to Show Cause hearing scheduled by the District Court, and acting without any notice to DAI, petitioners' counsel moved the Madison County Circuit Court for an order of default against DAI. The court entered a default judgment that same day, again without notice to DAI. Among other things, the Madison County Circuit Court purported to hold, through the default, that the arbitration clause in the Subway franchise agreement was not enforceable. *Distajo*, 66 F.3d at 449. DAI timely filed a motion to reopen the default, and when that motion was summarily denied, DAI appealed the default to the Illinois appellate court.[10/]

On February 13, 1995, the District Court granted DAI's petition to compel the Bickels to arbitrate in accordance with their arbitration agreement. The Bickels appealed the District Court's ruling, and their appeal was consolidated for oral argument with the already pending appeal of the *Distajo* franchisees.

4. On September 12, 1995 the Second Circuit issued its decision in the *Distajo* and *Bickel* appeals, a unanimous 41-page opinion authored by Judge José A. Cabranes. That

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[10] DAI's appeal is still pending; it has been stayed by the Illinois Appellate Court.

decision carefully considered and rejected most of petitioners' claims.[11/]

The first issue addressed by the Second Circuit was whether the District Court had subject matter jurisdiction over the Section 4 petitions. Petitioners argued that the existence of diversity jurisdiction in a Section 4 action is determined not by the citizenship of the parties before the federal court, but rather by the citizenship of the parties in any related state court case. Petitioners contended that their decision to sue some of DAI's local agents in their respective state court actions destroyed diversity in the federal actions, even though these individuals were not parties to the arbitration agreements and were not parties to DAI's Section 4 petitions.

The Second Circuit rejected petitioners' unprecedented interpretation of Section 4 and the requirements for diversity jurisdiction. *Distajo*, 66 F.3d at 445-46. As the Court explained, "[in] any federal action, diversity of citizenship is determined by reference to the parties named in the proceeding before the district court, as well as any indispensable parties who must be joined pursuant to Rule 19 of the Federal Rules of Civil Procedure." *Id.* at 445. DAI's local agents were not "indispensable parties" to the Section 4 action, in the Second Circuit's view, because the "district court can grant all the relief sought by DAI in this case -- an order compelling arbitration -- regardless of whether DAI's development agents (nonparties to the arbitration agreement) are present." *Id.* at 446. The Second Circuit also pointed out that petitioners' construction of Section 4 was flatly inconsistent with this Court's holding in *Moses H. Cone* that the FAA requires courts to enforce an arbitration agreement "notwithstanding the presence of other persons who are parties to the underlying dispute but

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[11] The Court reversed the District Court's failure to give full faith and credit to an Alabama judgment (see n. 8, *supra*) and remanded the case for additional consideration of two issues: (1) whether the arbitration clause was a product of fraud; and (2) whether DAI waived its right to arbitrate the dispute of any defendant. None of these issues is presented by the petition.

not to the arbitration agreement." *Id.*, citing, *Moses H. Cone*, 460 U.S. at 20. Because the parties did not dispute that there was complete diversity between DAI and each defendant in the Section 4 actions, the Second Circuit held that the District Court unquestionably had subject matter jurisdiction over the petitions. *Id.*

The Court next addressed whether the District Court should have given full faith and credit to the state court decisions. In deciding this issue, the Court recognized that "a federal court must 'give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so.' " *Id.* at 446, citing, *Allen v. McCurry*, 449 U.S. 90 (1980); *Valley Waste Disposal, Inc. v. Central Vermont Solid Waste Management Dist.*, 31 F.3d 89, 98 (2d Cir. 1994). Therefore, as the parties had agreed and the court acknowledged, the controlling question in each case was whether "the various state court judgments (. . . eight in Illinois and one in North Carolina) would be accorded preclusive effect under Illinois, or North Carolina law, respectively." *Distajo*, 66 F.3d at 446-47.

With respect to the decisions of the Illinois trial court, the Second Circuit observed that two directly controlling decisions of the Illinois Supreme Court hold that an Illinois trial court judgment is not final, and thus not entitled to preclusive effect, until all appellate rights have been exhausted. *Id.* at 449, citing *Ballweg v. City of Springfield*, 114 Ill. 2d 107, 113, 102 Ill. Dec. 360, 499 N.E.2d 1373 (Ill. 1986) and *Relph v. Board of Educ. of DePue Unit Sch. Dist.*, 84 Ill. 2d 436, 442, 50 Ill. Dec. 830, 420 N.E.2d 147 (Ill. 1981). After reviewing each decision, the Second Circuit concluded that "[d]espite the best efforts of the franchisees to distinguish *Ballweg* and *Relph*, we must follow the rulings of the Illinois Supreme Court." *Distajo*, 66 F.3d at 450. Because the Illinois state trial court rulings were, without doubt, still subject to appeal, the Second Circuit held that the District Court properly concluded that it was not required to give preclusive effect to these decisions. *Id.* at 449-50.

The Second Circuit also rejected petitioner Johnson's claims regarding the scope of the North Carolina state court ruling. "In North Carolina . . . collateral estoppel only precludes the relitigation of issues that were actually and necessarily decided in the earlier action." *Id.* at 450, citing *King v. Grindstaff*, 284 N.C. 348, 200 S.E.2d 799, 805 (1973). The Second Circuit observed that the written orders of the North Carolina court "did not explain why it denied the stay [under Section 3 of the FAA]", *Distajo*, 66 F.3d at 450, nor did they "make any findings of fact or conclusions of law regarding the arbitration clause." *Id.* Because petitioner could not satisfy his burden under North Carolina law of demonstrating "what was in fact determined by the[se] prior judgment[s]", the Second Circuit held that these rulings did not bar the District Court from compelling Mr. Johnson to arbitrate in accordance with his agreement with DAI. *Id.* at 450-51.

The Second Circuit also affirmed the District Court's ruling on abstention. The court did not expressly explain why the District Court had not committed an abuse of discretion in exercising jurisdiction over the petitions. However, by remanding the actions for further consideration, the Second Circuit implicitly recognized that the District Court's exercise of jurisdiction over DAI's petitions had been proper.

In September 1995, while petitioners' petitions for rehearing were pending in the Second Circuit, the Illinois petitioners filed a "Motion for Supervisory Order" with the Illinois Supreme Court. R. App. 66-89. That motion attempted to challenge the Second Circuit's conclusion that under Illinois law the Madison County Circuit Court's rulings were not entitled to preclusive effect. In essence, petitioners asked the Illinois Supreme Court to re-write the Illinois law on *res judicata*/collateral estoppel that the Second Circuit had properly applied. *Id.* The Illinois Supreme Court summarily denied petitioners' motion on October 31, 1995. R. App. 93. On November 22, 1995, the Second Circuit denied their petitions for rehearing. R. App. 61.

REASONS FOR DENYING THE PETITION

The Court should deny the Petition for Writ of Certiorari on each issue. The Second Circuit's decision that a federal court has subject matter jurisdiction over a Section 4 petition where there is complete diversity between the parties to the petition and no indispensable parties who would defeat diversity, is unremarkable and unquestionably correct. Even petitioners do not claim that the court's ruling conflicts with any decision of this Court or of any lower court. Petitioners' unprecedented reading of Section 4 is not supported either by the text of the FAA or by any of the traditional principles for determining diversity jurisdiction under Section 1332. Petitioners' argument also is illogical, since it would effectively eviscerate the federal courts' ability to enforce the FAA through petitions to compel arbitration under Section 4.

Petitioners fare no better in seeking review of the Second Circuit's decision on the preclusive effect of the Illinois and North Carolina state court rulings. Petitioners concede that the Second Circuit correctly held that under the full faith and credit statute, a district court is required to give state court decisions as much preclusive effect as, but no more than, each decision would receive in the forum state. Whether the Second Circuit correctly applied the law of Illinois and North Carolina on preclusion to the particular facts of each case does not present an issue that warrants this Court's review. Moreover, it is clear that the Second Circuit properly applied Illinois and North Carolina law to the facts of this case.

Finally, there is no reason for this Court to review the fact-specific determination of whether the District Court abused its discretion in exercising jurisdiction over DAI's Section 4 petitions. Petitioners' claim that the court's exercise of jurisdiction conflicts with this Court's ruling in *Moses H. Cone*, 460 U.S. 1 (1983), is fanciful. In fact, petitioners' argument turns the actual holding of *Moses H. Cone* on its head, since that decision held that a district court had *abused* its discretion in declining to exercise jurisdiction over a Section 4 petition despite the pendency of parallel state court litigation. The

District Court's exercise of jurisdiction here served the important goal of allowing the parties to have their rights under the FAA to enforce agreements to arbitrate determined in a consistent manner in the forum provided by Congress in the FAA.

I. THERE IS NO NEED TO "CLARIFY" THAT A FEDERAL COURT HAS SUBJECT MATTER JURISDICTION OVER A SECTION 4 PETITION WHERE THERE IS COMPLETE DIVERSITY BETWEEN THE PARTIES.

Petitioners concede, as they must, that the Second Circuit correctly ruled that Section 4 of the FAA confers jurisdiction on the District Court to hear petitions to enforce arbitration agreements "but only to the extent that the Court would otherwise have [subject matter] jurisdiction over the dispute." *Distajo*, 66 F.3d at 444. They also do not dispute that there is complete diversity between the parties to DAI's Section 4 petitions and do not appear to contest the Second Circuit's ruling that the other parties to the state court actions -- who are not parties to the arbitration agreements -- were not "indispensable" parties under Rule 19 of the *Federal Rules of Civil Procedure*. *See* Petitioners' Brief at 13-14. Petitioners are left to argue, therefore, that under Section 4 it is the citizenship of the parties to related state court actions, and not the citizenship of the parties to the federal action, that is determinative of subject matter jurisdiction over a petition to compel arbitration.

As the Second Circuit concluded, petitioners' argument is contrary to the language of Section 4 and is without precedent. *Distajo*, 66 F.3d at 445. Section 4 of the FAA provides, in part:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order

> directing that such arbitration proceed in the manner provided for in such agreement . . ..

9 U.S.C. § 4. As the Second Circuit recognized, the "controversy between the parties" in Section 4 refers to the dispute between the "party aggrieved by the alleged failure . . . of another to arbitrate", and the party contesting arbitration about whether the arbitration should "proceed in the manner provided for in such agreement." *Distajo*, 66 F.3d at 445-46. Section 4 also expressly states that the court must have "jurisdiction under Title 28," thereby incorporating the usual rules for determining diversity jurisdiction under Section 1332. Petitioners have never identified any language in the text of the FAA or its legislative history that even remotely suggests that Congress intended that diversity of citizenship would be determined by the citizenship of parties to a separate state court action, where the person seeking to avoid his agreement to arbitrate has, in furtherance of that goal, sued additional defendants.

Moreover, petitioners' assertion is also fundamentally at odds with this Court's decision in *Moses H. Cone*, *supra*. There, this Court held that "under the [FAA], an arbitration agreement must be enforced notwithstanding the presence of other persons who are parties to the underlying dispute but not to the arbitration agreement." *Moses H. Cone*, 460 U.S. at 20. If petitioners were correct, *Moses H. Cone* would never have been decided since, as here, that case arose out of parallel state court litigation involving non-diverse parties. *Moses H. Cone*, 460 U.S. at 7, n. 4. The Second Circuit's ruling on subject matter jurisdiction also is consistent with two recent decisions by the United States Court of Appeals for the Fifth Circuit, each of which hold that a district court must look only to the parties named in a Section 4 petition when determining whether diversity jurisdiction exists. *Snap-On Tools Corporation v. Mason*, 18 F.3d 1261, 1266-67 (5th Cir. 1994); *Prudential-Bache Sec., Inc. v. Fitch*, 966 F.2d 981, 988 (5th Cir. 1992).

Finally, the flaws in petitioners' position are also underscored by the practical effect that their interpretation of Section 4 would have on the ability of parties to compel arbitration under the FAA. If petitioners were correct, a corporation doing business nationwide rarely would be able to bring an action in federal court to compel arbitration with a non-diverse party. If a federal court were required to determine diversity according to the parties sued in a state court case, the district court, as a practical matter, could never exercise jurisdiction over a Section 4 petition, since a person resisting arbitration can almost always find some resident employee or other alleged agent of the corporation to sue in state court. As the Second Circuit recognized, therefore, the petitioners' interpretation would eviscerate the rights granted by Section 4, because the statute, on its face, provides that petitions to compel can only be brought in federal court, and only in the district where the arbitration would occur. *Distajo*, 66 F.3d 445-46. *See also Snyder v. Smith*, 736 F.2d 409, 420 (7th Cir.), *cert. denied*, 469 U.S. 1037 (1984); *Aaacon Auto Transport Inc. v. Ninfo*, 490 F.2d 83, 84 (2d Cir. 1974); *National Iranian Oil Co. v. Ashland Oil, Inc.*, 641 F. Supp. 211, 213 (S.D. Miss. 1986), *aff'd.* 817 F.2d 326 (5th Cir. 1987), *cert. denied*, 484 U.S. 943 (1987).

II. THERE IS NO REASON FOR THE COURT TO REVIEW THE SECOND CIRCUIT'S APPLICATION OF ILLINOIS AND NORTH CAROLINA LAW TO THE FACTS OF THIS CASE.

Petitioners do not contend that the Second Circuit was incorrect in holding that under the full faith and credit statute, 28 U.S.C. § 1738, a federal court must give a state court decision as much preclusive effect as, but no more than, the decision would receive in the forum state. *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984); *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 466 (1982); *Marresse v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 380 (1985); Wright, Miller & Cooper, *Federal Practice and Procedure* § 4469 (1981 & Supp. 1994). Thus, even

petitioners concede that the Second Circuit correctly applied the relevant federal legal standard and correctly articulated the relevant issue of state law -- namely, what preclusive effect would Illinois and North Carolina give to the state court decisions in this case. Petitioners merely argue that the Second Circuit misapplied the law of Illinois and North Carolina in deciding that the trial court rulings from those states did not preclude the District Court from determining DAI's Section 4 petitions. For the reasons discussed below, there is no reason for this Court to review the Second Circuit's application of these states' laws to the particular facts of these cases.

A. Petitioners claim that this Court must resolve a supposed split between the Second Circuit and the Illinois Supreme Court about whether the Madison County Circuit Court's rulings barred the District Court from deciding DAI's petitions. However, this supposed "conflict" exists only in petitioners' imagination. As the Second Circuit recognized, it is well settled under Illinois law that a trial court ruling has no *res judicata* or collateral estoppel effect unless and until it is a final judgment. *Sampson v. Cape Industries Ltd.*, 593 N.E.2d 1158, 1161 (Ill. App. 1992); *People v. Shlensky*, 454 N.E.2d 1103, 1106 (Ill. App. 1993). And under Illinois law, judgments are considered final for *res judicata*/collateral estoppel purposes **only** after all appeals have been exhausted, and **only** when all that is left in the case is execution on the judgment. *Ballweg*, 499 N.E.2d 1373 (Ill. 1986); *Relph*, 420 N.E.2d 147 (Ill. 1981); *Pelon v. Wall*, 634 N.E.2d 385 (Ill. App. 1994). There simply can be no question that this is the law of Illinois. Indeed, federal courts applying Illinois law have uniformly recognized these principles. *See e.g.*, *In re Leigh*, 165 B.R. 203, 217 (N.D. Ill. 1993) (in Illinois, "finality requires that the potential for appellate review has been exhausted"); *In re Richey*, 104 B.R. 5 (S.D. Ill. 1989) (same). Accordingly, the Second Circuit was unquestionably correct in holding that under the Illinois Supreme Court's decisions in *Ballweg* and *Relph*, the District Court properly declined to accord preclusive effect to the Madison County Circuit Court rulings.

Petitioners' reliance on purportedly contrary authority from Illinois intermediate courts obviously does not create a "conflict" between the Second Circuit and the Illinois Supreme Court. *See* Petition at 17-18. Petitioners' assertion of a "split" is also undermined by their failed attempt to convince the Illinois Supreme Court to review this very issue. As discussed previously, in their Motion for Supervisory Order with the Illinois Supreme Court, petitioners asked the Illinois Supreme Court effectively to overrule *Ballweg* and *Relph* and hold that the Madison County orders should be given preclusive effect. R. App. 66-89. That the Illinois Supreme Court summarily declined petitioners' invitation lends a hollow ring to their claim that this Court should expend its resources to resolve a question of Illinois law that is well settled.

B. Petitioner Johnson does not even argue that the Second Circuit applied the wrong legal standard under North Carolina law in reviewing his collateral estoppel claim. Indeed, the parties expressly agreed below that a ruling by the North Carolina court that actually decided DAI's rights under the FAA would be treated as "final" for purposes of *res judicata* and collateral estoppel by North Carolina courts. The parties also agreed that *res judicata* and collateral estoppel apply only to matters actually litigated and decided in the earlier action. *King*, 200 S.E.2d at 805 (N.C. 1973); *York v. Northern Hosp. Dist.*, 96 N.C. App. 456, 459, 386 S.E.2d 99, 101 (N.C. App. 1989); *Mason v. Highway Comm.*, 7 N.C. App. 644, 647, 173 S.E.2d 515, 516 (N.C.App. 1970).

Thus, the issue that the Second Circuit decided was the fact-specific question of whether the particular orders rendered by the North Carolina trial court actually decided DAI's rights under the FAA. In resolving that issue, the Second Circuit recognized that in North Carolina, the party invoking *res judicata* or collateral estoppel bears the burden of establishing what was actually determined by the prior judgment. *Distajo*, 66 F.3d at 450, citing, *Thomas M. McInnis & Assocs., Inc. v. Hall*, 318 N.C. 421, 429, 349 S.E.2d 552, 557 (N.C. 1986). *See also, Hales v. North Carolina Ins. Guar. Ass'n*, 111 N.C.

App. 892, 895, 433 S.E.2d 468, 470 (N.C. App. 1993).[12/] Here, the North Carolina court's rulings explicitly addressed only the issue of whether Mr. Johnson's prior participation in arbitration with DAI waived his right to challenge enforcement of the arbitration clause. The state court made no findings of fact or conclusions of law regarding any of petitioner's objections to proceeding with arbitration and did not consider the enforceability of the arbitration agreement. Accordingly, the Second Circuit was correct in concluding that the decision of the North Carolina court "would not be accorded preclusive effect under North Carolina law with respect to the validity of the arbitration clause." *Distajo*, 66 F.3d at 451.

At bottom, petitioner merely disagrees with the Second Circuit's conclusion that the orders of the North Carolina court did not decide whether petitioner was required to arbitrate with DAI. There is no reason for this Court to grant certiorari to review such a narrow, fact-specific determination that has no application beyond the parties to this case. *See, e.g., NCAA v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 98 n.15 (1984); *Rogers v. Lodge*, 458 U.S. 613, 623 (1982); *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949); *U.S. v. Doe*, 465 U.S. 605 (1984).

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[12] Federal courts have recognized that in an action under Section 4, collateral estoppel will only prevent "relitigation of arbitrability once it has been actually litigated and is essential to the first decision." *Midwest Mechanical Contractors, Inc. v. Commonwealth Constr. Co.*, 801 F.2d 748, 750-51 (5th Cir. 1986). "[I]f there is no showing as to the issues that were *actually* decided, there is no issue preclusion." *Id.* (*citing* Wright, Miller & Cooper, *Federal Practice and Procedure*, § 4420 (1981 & Supp. 1994) (emphasis added). Thus, where an order denying either a stay or a petition to compel under the FAA fails to state its basis, neither *res judicata* nor collateral estoppel bars the litigation of arbitrability. *Midwest Mechanical Contractors*, 801 F.2d at 751-52.

III. THERE IS NO REASON TO REVIEW THE DISTRICT COURT'S DECISION NOT TO ABSTAIN UNDER THE PARTICULAR FACTS OF THIS CASE.

This petition arises out of an unique procedural history and involves a highly unusual set of facts. Since there is no dispute or conflict as to the relevant legal principles at issue, and since it is clear that petitioners' abstention claim turns largely on the uncommon facts of these cases, there is no reason for the Court to grant petitioners' request to review the District Court's exercise of jurisdiction over DAI's Section 4 petitions.

Petitioners contend that the District Court's refusal to abstain somehow conflicts with this Court's decision in *Moses H. Cone*. Yet in making this argument, petitioners ignore the holding of *Moses H. Cone*. There, this Court held that the existence of parallel state court litigation -- the only factor relied upon by petitioners here -- is not an "exceptional circumstance" that permits a district court to abstain from exercising jurisdiction over a Section 4 petition to compel arbitration. *Moses H. Cone*, 460 U.S. at 21-26. Thus, this Court held that the district court's "refusal to proceed was plainly erroneous in view of Congress' clear intent, in the Arbitration Act, to move parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *Id.* at 24. As the Court explained:

> The basic issue presented in [the] federal suit was the arbitrability of the dispute between Mercury and the Hospital. Federal law in the terms of the Arbitration Act governs that issue in either state or federal court. . . . [O]ur task in cases such as this is not to find some substantial reason for the *exercise* of federal jurisdiction by the district court; rather, the task is to ascertain whether there exist "exceptional" circumstances, the "clearest of justifications," that can suffice under *Colorado River* to justify the *surrender* of that jurisdiction. Although in some rare circumstances

> the presence of state-law issues may weigh in favor of that surrender . . . the presence of federal-law issues must always be a major consideration weighing against surrender.

Id. at 24-26 (emphasis in original).

The only distinction between this case and *Moses H. Cone* is that petitioners' dilatory motion practice here slowed resolution of the petitions and deprived DAI of its right to "rapid and unobstructed enforcement of arbitration agreements." *Moses H. Cone*, 460 U.S. at 23. That this tactic, which runs counter to Congress's intent in enacting the FAA, resulted in the entry of summary rulings in Illinois and North Carolina state courts that the Second Circuit properly held have no preclusive effect, in no way constitutes the "exceptional-circumstances" required for abstention that were described in *Colorado River*, 424 U.S. 800 (1976). In view of the holding in *Moses H. Cone*, it is not surprising that petitioners are unable to point to a single decision, either by this Court or any lower federal court, that conflicts with the decision of the District Court to exercise jurisdiction in this case.

Finally, petitioners' claim that the District Court's exercise of jurisdiction over these petitions resulted in "piecemeal" litigation is equally baseless. Quite the contrary, when the District Court exercised jurisdiction over the petitions, it sought to avoid the possibility of inconsistent rulings on arbitrability in various state courts and to resolve the parties' rights under federal law in a consistent, uniform manner in the forum specified by Congress in the FAA. The District Court, therefore, fully complied with its "unflagging obligation" to exercise jurisdiction over a Section 4 petition, even where there is parallel state court litigation. *Moses H. Cone*, 460 U.S. at 15 (citations omitted).

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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